

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH DIXON and DEPARTMENT OF LABOR,  
MINE SAFETY & HEALTH ADMINISTRATION, Barboursville, Ky.

*Docket No. 96-878; Submitted on the Record;  
Issued September 23, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further merit review of his claim.

On December 20, 1993 appellant, then a 62-year-old chief of engineering services, filed an occupational disease claim alleging that he sustained pneumoconiosis which he attributed to being exposed to coal dust at work since 1977.

In a report dated December 8, 1993, Dr. Glen R. Baker, a Board-certified internist specializing in pulmonary diseases and a certified "B" reader, provided a history of appellant's condition and noted that he had been exposed to coal dust for 34 years in his job and also had a history of smoking one quarter pack of cigarettes per day for 30 years. He provided findings on examination and diagnosed pneumoconiosis based on x-rays and exposure, chronic obstructive airway disease based on pulmonary function testing, and chronic bronchitis based on history. Dr. Baker opined that appellant had an occupational lung disease caused by his coal mine employment.

By letter dated February 2, 1994, an employing establishment supervisor stated that appellant was exposed to coal and rock dust during his employment.

By letter dated June 22, 1994, the Office referred appellant, along with a statement of accepted facts and copies of the entire medical record, to Dr. Subramaniam K. Paranthaman, a Board-certified internist specializing in pulmonary diseases, for an examination and evaluation as to whether appellant had any medical condition causally related to his federal employment.

In a report dated July 22, 1994, Dr. Paranthaman provided a history of appellant's condition, findings on examination, and the results of x-rays and pulmonary tests. He diagnosed asthmatic bronchitis and rheumatoid arthritis and stated his opinion that appellant's condition was not caused by coal dust exposure but could have been aggravated by the exposure.

By letter dated September 2, 1994, the Office referred appellant to Dr. Ramanarao V. Mettu, a Board-certified internist specializing in pulmonary diseases and an impartial medical specialist, for an examination and evaluation in order to resolve the conflict in medical opinion as to whether appellant had sustained any employment-related pulmonary condition.

In a report dated September 26, 1994, Dr. Mettu provided a history of appellant's condition, findings on examination and the results of pulmonary function tests and diagnosed chronic bronchitis, rheumatoid arthritis, shortness of breath, and a history of myocardial infarction. Dr. Mettu included a report dated September 29, 1994 in which Dr. Dennis H. Halbert, a Board-certified radiologist, stated that a chest x-ray showed no evidence of pneumoconiosis. The Office subsequently received a copy of a certificate establishing that Dr. Halbert was a certified "B" reader.

By decision dated October 31, 1994, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that appellant had sustained any medical condition causally related to factors of his federal employment.

By letter dated December 7, 1994, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 5, 1995, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that his request was not filed within the 30-day time limitation for requesting a hearing.

By letter dated September 2, 1995, appellant, through his representative, requested reconsideration of the denial of his claim and submitted additional evidence.

By letter dated September 13, 1995 sent to appellant's attorney, Dr. Abdi Vaezy, a Board-certified internist specializing in pulmonary diseases, stated:

"As you [appellant's attorney] stated, [appellant] has [a] history of pneumoconiosis. He has pleurisy and pleural effusion for which he has been treated for the last few months. This pleurisy seems to be related to his rheumatism; however, this certainly could compound and exacerbate his previously existing pneumoconiosis and contribute to increasing breathing problems."

By decision dated October 26, 1995, the Office denied appellant's request for further merit review of his claim on the grounds that the evidence submitted in support of his request was found to be irrelevant and immaterial and insufficient to warrant further merit review.

The Board finds that the Office did not abuse its discretion in denying appellant's request for further merit review of his claim.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed his appeal with the Board on January 23, 1996, the only decision properly before the Board is the Office's October 26, 1995 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's October 31, 1994 decision denying appellant's claim for compensation benefits.<sup>2</sup>

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or a fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

In this case, appellant filed a claim for compensation benefits alleging that he sustained pneumoconiosis due to coal dust exposure at work. By decision dated October 31, 1994, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he had sustained pneumoconiosis as a result of his federal employment. By letter dated September 2, 1995, appellant, through his representative, requested reconsideration of the denial of his claim and submitted additional evidence.

By letter dated September 13, 1995 sent appellant's attorney, Dr. Vaezy, a Board-certified internist specializing in pulmonary diseases, stated:

"As you [appellant's attorney] stated, [appellant] has [a] history of pneumoconiosis. He had pleurisy and pleural effusion for which he has been treated for the last few months. This pleurisy seems to be related to his rheumatism; however, this certainly could compound and exacerbate his previously existing pneumoconiosis and contribute to increasing breathing problems."

The issue in this case is causal relationship. Dr. Mettu, the Board-certified internist specializing in pulmonary diseases, who was selected to resolve the conflict in medical opinion as to whether appellant had sustained any medical condition causally related to his employment, examined appellant and the medical evidence and did not find any employment-related condition. Included with Dr. Mettu's report was the report of Dr. Halbert, a Board-certified radiologist and a certified "B" reader, who stated that appellant's chest x-ray showed no evidence of pneumoconiosis.

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<sup>1</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>2</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

The September 13, 1995 report of Dr. Vaezy does not constitute pertinent evidence not previously considered by the Office. The medical evidence of record does not establish that appellant sustained a pneumoconiosis condition but Dr. Vaezy presumes in his report that appellant has this condition, apparently based upon a statement in a letter from appellant's attorney. Dr. Vaezy then states that appellant has pleurisy and rheumatism which could aggravate his pneumoconiosis. As it has not been established by the medical evidence that appellant had pneumoconiosis, the report of Dr. Vaezy does not constitute new pertinent evidence and the Office did not abuse its discretion in refusing to reopen appellant's case for further merit review.

The decision of the Office of Workers' Compensation Programs dated October 26, 1995 is affirmed.

Dated, Washington, D.C.  
September 23, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member